

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 81-5497

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

**KURT ARTHUR VIERTHALER,
MIKE LEE VIERTHALER, and
SCOTT ERRICO,**
Defendants-Appellants.

**Appeal from the United States District Court for the
Southern District of Florida.**

ON PETITION FOR REHEARING

(OCT 14 1982)

**Before VANCE and JOHNSON, Circuit Judges, and
ALLGOOD, District Judge.***

IT IS ORDERED that the petition for rehearing
filed in the above entitled and numbered cause by Kurt
Arthur Vierthaler and Mike Lee Vierthaler be and the
same is hereby Denied.

ENTERED FOR THE COURT:

/s/ _____
United States Circuit Judge

***Hon. Clarence W. Allgood, U.S. District Judge for the Southern
District of Alabama, sitting by designation.**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5497

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

KURT ARTHUR VIERTHALER,
MIKE LEE VIERTHALER, and
SCOTT ERRICO,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Florida.

ON PETITION FOR REHEARING

(OCT 14 1982)

Before VANCE and JOHNSON, Circuit Judges, and
ALLGOOD, District Judge.*

IT IS ORDERED that the petition for rehearing
filed in the above entitled and numbered cause by
Appellant Scott Errico, be and the same is hereby
Denied.

ENTERED FOR THE COURT:

/s/ _____
United States Circuit Judge

*Hon. Clarence W. Allgood, U.S. District Court Judge for the
Northern District of Alabama, sitting by designation.

DEC 30 1982

ALEXANDER L. STEVAS
CLERK

No. 82-985

in the
Supreme Court
of the
United States

MIKE LEE VIERTHALER,
KURT ARTHUR VIERTHALER, and
SCOTT ERRICO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

**SUPPLEMENTAL APPENDIX TO PETITION FOR
WRIT OF CERTIORARI TO THE COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT**

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IN THE UNITED STATES CIRCUIT COURT
FOR THE ELEVENTH CIRCUIT

No. 81-5497

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

KURT ARTHUR VIERTHALER,
MIKE LEE VIERTHALER,
SCOTT ERRICO,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(August 19, 1982)

Before VANCE and JOHNSON, Circuit Judges, and
ALLGOOD*, District Judge.

PER CURIAM:

Appellants were convicted after a bench trial of
one count of possession of marijuana on board an American

*Honorable Clarence W. Allgood, U.S. District Judge
Northern District of Alabama, sitting by designation.

vessel with intent to distribute, in violation of 21 U.S.C. §955a and 18 U.S.C. §2. On appeal they raise two arguments, neither of which is meritorious. We affirm.

On November 20, 1980, a Coast Guard cutter spotted the WINDY TOO, a small American sailing vessel out of Fort Lauderdale, Florida, in international waters approximately sixteen miles from the Bahamas. The captain of the Coast Guard vessel decided to inspect the WINDY TOO and sent a boarding party to that ship. While circling the WINDY TOO, the boarding party saw bales of an unidentified substance through open windows in the ship. Once on board the sailboat the boarding party saw many bales of marijuana in plain view through an open hatch into the cockpit area. The three people aboard were arrested and a general search revealed that the boat contained over 18,400 pounds of marijuana.

Appellants raised two arguments. First, they contend that section 955a is unconstitutional because it does not require proof of intent to distribute narcotics in the United States. They argue in essence that due process considerations prohibit application of American criminal laws to their conduct absent some proof of a nexus with the United States. This argument, however, has recently been foreclosed by our decision in *United States v. Riker*, 670 F.2d 987, 988 (11th Cir. 1982), where we upheld the constitutionality of section 955a against a similar challenge.

Appellants also contend that the evidence was insufficient to convict them. Relying heavily upon the decision in *United States v. MacPherson*, 644 F.2d 69

(5th Cir. 1981), appellants argue that the government only proved that they were present on board the WINDY TOO, and that mere presence is insufficient to sustain their convictions. We disagree with appellants' characterization of the evidence. The evidence showed that they were on board a small boat in which over nine tons of marijuana were stored in plain view all over the ship. Unlike the defendant in *MacPherson*, none of the appellants here can seriously contend that they were unaware of the marijuana and the illegal purpose of the voyage. It is clear that more than "mere presence" has been established in this case and that the government introduced sufficient evidence to sustain the convictions. See *United States v. Riker*, 670 F.2d at 989; *United States v. Mazyak*, 650 F.2d 788, 790-91 & n.2 (5th Cir. 1981), *cert. denied*, ____ U.S. ____, 102 S.Ct. 1281 (1982); *United States v. DeWeese*, 632 F.2d 1267, 1271-72 (5th Cir. 1980), *cert. denied*, ____ U.S. ____, 102 S.Ct. 358 (1981).

AFFIRMED.